

# Family Cap and the Unconstitutional Conditions Doctrine: Scrutinizing a Welfare Woman's Right to Bear Children

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## I. INTRODUCTION

As it exists today, the welfare system in the United States is doomed to failure. Taxpayers, politicians, and even recipients are urging reform and President Clinton has promised to "end welfare as we know it."<sup>1</sup> While federal welfare reforms are still in the preliminary stages, a number of states have taken the initiative and enacted various experimental reform programs.<sup>2</sup> These programs generally focus on helping the poor and disabled become self-supporting. However, inaccurate negative stereotypes of recipients as lazy, undeserving freeloaders who abuse the system often transform positive motivations for reform into punitive measures designed to reform the individuals rather than the system. The zeal for reform and the political popularity derived from effecting change cannot justify violating the individual rights and freedoms of the welfare recipients.

One program which may cross the line between permissible state action and unconstitutional intrusion is known as Family Cap.<sup>3</sup> This program deters families who receive Aid to Families with Dependent Children (AFDC)<sup>4</sup> benefits from having children while on welfare by denying them additional benefits. Although it is frequently asserted that there is no constitutional right to welfare, this argument is merely a smoke screen to mask serious violations. The Family Cap program infringes upon the fundamental right of reproductive

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<sup>1</sup> *What Works*, NEW REPUBLIC, Jan. 3, 1994, at 7.

<sup>2</sup> Georgia, Iowa, Illinois, Vermont, Virginia, Wyoming, and Wisconsin are a few of the states which have enacted reform programs. *Battle Looms over Welfare Reform*, PLAIN DEALER (Clev.), Dec. 26, 1993, at 18-A; *see also infra* part II.

<sup>3</sup> The program has a different name in each state in which it has been proposed or been enacted, such as Child Exclusion in New Jersey and the Parental Responsibility Project in Wisconsin. I have adopted the Family Cap title because it is not identified with any one state and refers more generally to all programs of this type. *See generally* Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992).

<sup>4</sup> 42 U.S.C. §§ 601-687 (1988).

choice guaranteed in *Roe v. Wade*.<sup>5</sup> This freedom of choice and privacy includes both the decision to bear children as well as to terminate pregnancies.<sup>6</sup> Any government action restricting these rights must meet the highest standards of justification. This Comment will examine these issues to determine the constitutional validity of Family Cap.<sup>7</sup>

Part II provides a brief background of Family Cap and its present status as state law and as a tool for reform. Part III explores the argument that, although there is no established constitutional right to welfare, the Supreme Court has occasionally implemented the doctrine of unconstitutional conditions to strike down welfare restrictions imposed by the government which burden fundamental rights. This part analyzes how Family Cap violates the rights to procreation, to privacy, and to reproductive choice by placing a restrictive condition on the pursuit of those rights. According to the unconstitutional conditions doctrine, these fundamental rights require a stricter standard of judicial review than normally applied to public assistance cases. Part IV argues that Family Cap could not survive such strict review because its validity is undermined by its flawed premises, its practical incongruity with limited abortion funding for low-income women, and the inescapable reality that the children it excludes from financial assistance will eventually cost the state more money in order to correct exacerbated health and educational problems. Finally, this Comment concludes that the Family Cap program should be abandoned before it is approved on a federal level where it is presently under consideration.

## II. THE FAMILY CAP PROGRAM

Family Cap has been enacted in at least four states: New Jersey,<sup>8</sup> Wisconsin,<sup>9</sup> Arkansas,<sup>10</sup> and Georgia.<sup>11</sup> While the specific provisions of each

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<sup>5</sup> 410 U.S. 113 (1973).

<sup>6</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (permitting unmarried people the right to decide whether or not to have children); *see infra* part III.B.

<sup>7</sup> There are also a number of alleged statutory violations involved which are presently being considered in *C.K. v. Shalala*, No. 93-5354 (D.N.J. filed Dec. 1, 1993), which is pending in the District Court of New Jersey. These violations will not be discussed in this Comment.

<sup>8</sup> N.J. STAT. ANN. § 44:10-3.5 (West 1993).

<sup>9</sup> WIS. STAT. ANN. § 49.25(4) (West Supp. 1994-1995).

<sup>10</sup> The U.S. Department of Health and Human Services recently granted Arkansas's request to experiment with a Family Cap program in all but 10 of its counties. James Jefferson, *U.S. Lets Arkansas Stop Extra Welfare Check for Added Children; Reform Aims to Cut Costs, Boost 'Responsibility'*, COMM. APPEAL (Memphis), Apr. 6, 1994, at 1B.

state's program vary, the basic concept is consistent. If a woman bears a child while her family<sup>12</sup> is receiving benefits from AFDC, the family will not receive any increase in governmental support. For example, a family of three will receive only the benefits of a family of two; the new child will not be eligible for any state assistance.<sup>13</sup> Each state must receive a waiver from the federal government, specifically the Department of Health and Human Services (HHS), in order to alter the statutory requirements of the AFDC program.<sup>14</sup> The Clinton Administration has been granting these waivers in an effort to give the states more flexibility in welfare reform.<sup>15</sup> New Jersey's program is the

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<sup>11</sup> GA. CODE ANN. § 49-4-115 (1994). Numerous other states, such as California, Arizona, Maryland, and Nebraska, are considering Family Cap proposals or are presently seeking the necessary federal waiver. The program has been rejected by state legislatures in Louisiana, Missouri, Maine, South Carolina, Oklahoma, Virginia, and Indiana. Kelly Richmond, *Reshaping the Welfare State*, RECORD, June 19, 1994, at A25 (citing the American Public Welfare Association as its source). For discussion of federal waiver, see *infra* note 15 and accompanying text.

<sup>12</sup> Throughout this Comment, "family" generally refers to a single parent household where the parent is the mother. While this is not always the case, it is the likely scenario.

<sup>13</sup> The newborn child is still eligible for food stamps which are provided by the federal government.

<sup>14</sup> 42 U.S.C. § 1315(a) (1988) (waiver provision). AFDC is a federally funded program which is administered by the states, however the states are not required to adopt it. In fact, Wisconsin recently decided to withdraw from the federal welfare system and create its own public relief program by 1999. *What Works*, *supra* note 1.

<sup>15</sup> Under the Bush Administration, HHS granted New Jersey's and Wisconsin's waivers pursuant to 42 U.S.C. § 1315, the provision of the Social Security Act which allows waiver of the requirements of AFDC, 42 U.S.C. § 602. Prior to filing suit on behalf of affected welfare recipients, the Legal Services of New Jersey, the National Organization for Women (NOW) Legal Defense Fund, and the American Civil Liberties Union (ACLU) of New Jersey asked the Clinton Administration to reverse New Jersey's waiver, but it refused.

Many advocates of welfare reform argue that the federal government should step aside and allow the states to control the administration of welfare benefits. Given his experiences as a former governor, President Clinton has promised to give states more flexibility to experiment with new programs and has used the federal waiver to fulfill this promise. Jason DeParle, *States' Eagerness to Experiment on Welfare Jars Administration*, N.Y. TIMES, Apr. 14, 1994, at A1. Opponents, however, argue that the waivers have been granted too easily and that many of these experimental programs violate welfare recipients' rights. One California program that was granted a waiver was subsequently declared unconstitutional. See *Green v. Anderson*, 811 F. Supp. 516 (E.D. Cal. 1993), *aff'd*, 26 F.3d 95 (9th Cir. 1994) (enjoining a program which cut benefits to new residents as a violation of the right to travel). Congress has also heard testimony concerning HHS's failure to consider the experimental programs' impact on children and families before granting the waivers, an issue pertinent to Family Cap. See *Testimony of Melinda Bird*, Western Center on Law and

only Family Cap program which is fully operational and it has subsequently been challenged in the District Court of New Jersey by various nonprofit legal groups on behalf of the affected AFDC recipients.<sup>16</sup> Due to its operational status and the pending suit, it serves as the model for this Comment.

### A. Individual State Provisions

The New Jersey Family Cap program, also called Child Exclusion, was enacted as one bill in a six-bill package collectively referred to as the Family Development Act.<sup>17</sup> The other five bills in the package focus on helping recipients become self-supporting through training programs, education, and marriage incentives. The Family Cap statute provides for "eliminating the increment in benefits under the AFDC program for which that family would otherwise be eligible as a result of the birth of a child during the period in which the family is eligible for AFDC benefits . . . ."<sup>18</sup> The state determines a standard of need for each welfare family according to the number of family members, sources of income, and other factors.<sup>19</sup> Under the New Jersey Family Cap program, the family's standard of need will not be incrementally adjusted to accommodate the new child. As an incentive to encourage these families to work and to become self-supporting, an "earned income disregard"<sup>20</sup> is attached to the program. This provision allows a recipient family to keep any income it earns by working without having its benefits reduced. Normally, when calculating the standard of need, the state deducts

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*Policy, Before the Human Resources Subcommittee of the House Committee on Government Operations*, Federal News Service, Sept. 29, 1994, available in LEXIS, NEWS Library, CURNWS file.

<sup>16</sup> C.K. v. Shalala, No. 93-5354 (D.N.J. filed Dec. 1, 1993), was filed by the Legal Services of New Jersey, NOW Legal Defense Fund, and the ACLU of New Jersey. The case is being brought in federal court because the plaintiffs are challenging HHS's decision to grant New Jersey's waiver as well as claiming that New Jersey's Family Cap violates various federal statutes and the Constitution. On April 28, 1994, the plaintiffs moved for a preliminary injunction. Three motions for summary judgment, submitted by C.K., HHS, and the New Jersey Department of Health, were argued before Judge Politan in 1995, but no order has been issued yet. See David Glovin, *Welfare Advocates File to Bar Reform*, RECORD, Apr. 29, 1994, at A03. Two conservative groups, the American Legislative Exchange Council and the Empowerment Network Foundation, have moved to be included as defendants in the suit. See *Conservative Groups Challenge Family Caps*, Abortion Rep. (American Political Network), Mar. 4, 1994 (States section).

<sup>17</sup> N.J. STAT. ANN. § 44:10-19 (West 1993).

<sup>18</sup> *Id.* § 44:10-3.5.

<sup>19</sup> See 42 U.S.C. § 602(a)(7)(A) (1988).

<sup>20</sup> N.J. STAT. ANN. § 44:10-3.6 (West 1993).

any earned income from the benefits allotted to the recipient family. The Family Cap incentive "disregards" the added income of any employed family member when determining the family's standard of need; the earned income is not deducted entirely from the benefits.<sup>21</sup> Thus, the family's newly calculated standard of need should theoretically accommodate the addition of another child.

The other states' Family Cap programs resemble New Jersey's with minor yet noteworthy distinctions. The Wisconsin Parental Responsibility Project<sup>22</sup> is similar to the New Jersey plan except that it is aimed solely at teenage parents. The provisions are otherwise generally the same, including the earned income disregard. Arkansas's Family Cap provides recipients with access to Norplant and other birth control counseling and education.<sup>23</sup> The Georgia Family Cap program,<sup>24</sup> does not have the earned income disregard incentive. However, it exempts births which are the result of "a verifiable rape or incest."<sup>25</sup> Furthermore, it is limited to recipients who have been receiving benefits for a period of twenty-four months.<sup>26</sup> Despite the practical ambiguity of what constitutes a "verifiable" case of rape or incest, these two qualifying factors make the Georgia program the least objectionable model of Family Cap.<sup>27</sup>

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<sup>21</sup> *Id.*

<sup>22</sup> WIS. STAT. ANN. §49.25(4) (West Supp. 1994-1995).

<sup>23</sup> See Jefferson, *supra* note 10.

<sup>24</sup> GA. CODE ANN. § 49-4-115 (1994).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* The program became effective January 1, 1994.

<sup>27</sup> Part IV explains that two of the flaws of the Family Cap program are that it penalizes women for getting pregnant regardless of the reason (rape, incest, failure of contraceptives) and that the program is based on inaccurate stereotypes of welfare mothers, including that most recipients are permanently dependent. The Georgia statute appropriately narrows its focus to exclude rape and incest victims and the clearly short-term, transitional recipients. The constitutional issues raised by this Comment are still applicable to its program, however.

A Maryland Family Cap proposal attempted to minimize the problems associated with penalties and inaccurate stereotypes by linking the passage of the program to the end of the ban on state funding for abortions. Charles Babington, *Maryland Senate Links Welfare, Abortion Fund Changes*, WASH. POST, Mar. 25, 1994, at C3. This compromise, however, led to legislative disagreement and the Family Cap provision was removed from the bill. Governor Schaeffer vetoed the resulting bill and was pursuing the federal waiver for Family Cap prior to losing the 1994 election. Robert Timberg, *Bentley Would Toughen Welfare Requirements*, BALTIMORE SUN, Sept. 8, 1994, at 1C. Following that election, the Maryland House of Delegates added a modified Family Cap measure to its most recent welfare reform bill. This measure provides vouchers to help pay for some infant necessities, such as diapers and formula. The state's senate has refused to adopt any Family Cap measure. Marina Sarris, *Assembly Has Much Left to Do*, BALTIMORE SUN, Apr. 2, 1995, at 1C. Recently

## B. Statutory Shortcomings

The earned income disregard is a deceptive tool of welfare reform. Employment is often difficult if not impossible for single welfare mothers. Welfare mothers face a variety of obstacles which make it difficult for them to make a successful transition from the home to the workplace: gender discrimination, poverty, lack of skills, and often disabilities and minority status.<sup>28</sup> Although society now expects mothers to work while they are pregnant or when they have newborns and infants at home, only one-fourth of nonwelfare married mothers work full-time; the others either work part-time or not at all.<sup>29</sup> Furthermore, without adequate childcare facilities, work is unrealistic for most single mothers. Thus, many AFDC recipients who would be "eligible" for the earned income disregard have no real access to it.

Enacted in the name of reform, these statutes allow the government to intrude into one of the most private decisions a woman makes during her life: whether or not to have a child. The denial of funding deprives the family of basic necessities such as diapers, food, clothes, and housing.<sup>30</sup> The state is trying to stop women from pursuing their right to have a child by denying them necessary aid if they exercise it. In light of these constitutional and practical problems, the New Jersey Family Cap bill was opposed by church groups, the American Civil Liberties Union, the New Jersey Association for Children, and

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elected Governor Parris N. Glendening has said he opposes Family Cap, but he has also indicated that he would not veto a welfare reform bill that included it. Terry M. Neal, *Maryland Parents Behind on Child Support Could Lose Drivers Licenses*, WASH. POST, Mar. 30, 1995, at B03.

<sup>28</sup> JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY* 167 (1991).

<sup>29</sup> DAVID T. ELLWOOD, *POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY* 132-33 (1988). One economist, Jared Bernstein of the Washington-based Economic Policy Institute, points out the irony of these societal expectations: "Conservatives talk about family values. Sure, they want women to stay home and look after their children—unless of course they're talking about women on welfare and, then, they're supposed to get out and get a job." Linda Diebel, *Bill Clinton's War on America's Poor; U.S. Welfare Reforms Are Having a Cruel Impact on Women and Children. Will Our Poor Be Next?*, TORONTO STAR, Mar. 6, 1994, at E1.

<sup>30</sup> Press Release from the Legal Services of New Jersey, NOW Legal Defense Fund, and ACLU of New Jersey, *Women and Children Receiving AFDC Sue Federal and State Agencies to Overturn Exclusion of Newborn Children from AFDC Grant and Eliminate State Efforts to Deter Conception and Birth of Children 1* (Dec. 1, 1993) (on file with NOW Legal Defense Fund and the *Ohio State Law Journal*).

the National Organization for Women.<sup>31</sup> At the time, presidential candidate and Arkansas Governor Bill Clinton declared he would not sign such a bill in his state.<sup>32</sup> Today, however, the Clinton Administration is considering Family Cap as a possible federal reform.<sup>33</sup>

### III. THE IMPOSITION OF AN UNCONSTITUTIONAL CONDITION

Ultimately, Family Cap's goal is to modify the behavior of welfare mothers by punishing those families who, for whatever reason,<sup>34</sup> do not comply with the government's desires and conditions. The denial of benefits causes the loss of basic necessities which effectively coerces women into waiving their fundamental right to bear a child.<sup>35</sup> According to the doctrine of unconstitutional conditions, the government is barred from indirectly violating a right which the Constitution forbids it to violate directly.<sup>36</sup> In other words, because the government cannot enact a law forbidding welfare mothers to have children, it cannot use a condition on their benefits to achieve the same result. It has been suggested that the central purpose of the doctrine is to determine what level of judicial review should be applied to the government's action.<sup>37</sup> If

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<sup>31</sup> Wayne King, *Senate Sends Florio Welfare Bill That Limits Benefits for Mothers*, N.Y. TIMES, Jan. 14, 1992, at A1.

<sup>32</sup> Wayne King, *Florio Signs an Overhaul of Welfare*, N.Y. TIMES, Jan. 22, 1992, at B1.

<sup>33</sup> "Clinton's reform package allows every state to implement a New Jersey-style family cap without having to seek a federal waiver." Richmond, *supra* note 11; *see also Battle Looms over Welfare Reform*, *supra* note 2.

<sup>34</sup> Although the program seeks to encourage "mutual responsibility" of welfare mothers in order to promote family planning and to end the "thoughtless childmaking" discussed in Part IV, Family Cap punishes mothers who involuntarily get pregnant as well. With the exception of the Georgia statute, there are no exceptions for rape, incest, or failure of contraceptive devices.

<sup>35</sup> *See infra* part III.B for analysis of this fundamental right.

<sup>36</sup> *See generally* Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989). *Cf.* Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990).

<sup>37</sup> "Unconstitutional conditions doctrine determines how much government justification is to be demanded, not whether the demand has been met." Sullivan, *supra* note 36, at 1422 n.22.

the condition affects a constitutional right, the doctrine requires that it be subject to the highest level of review rather than merely the rational basis test normally applied to government regulations. An examination of this claim involves an explanation of the purpose and development of the doctrine, a review of the rights in question, and an analysis of the application of the doctrine to the Family Cap program.

### A. *Purpose and Development of the Unconstitutional Conditions Doctrine*

The unconstitutional conditions doctrine was originally developed during the *Lochner* era<sup>38</sup> as a judicial tool to protect individual economic liberties from state intervention.<sup>39</sup> Through the doctrine, the Supreme Court used the Constitution to limit the increasingly expansive government interference in the free flow of interstate commerce. One of the earliest and clearest statements of the doctrine is found in *Frost & Frost Trucking Corp. v. Railroad Commission*,<sup>40</sup> a 1926 case concerning restrictions attached to the use of state highway systems:

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens to otherwise withhold. . . . If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may be thus manipulated out of existence.<sup>41</sup>

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<sup>38</sup> See *Lochner v. New York*, 198 U.S. 45 (1905). The *Lochner* era is characterized by the Court's frequent overturning of state laws which interfered with economic liberties under the Due Process Clause of the Fourteenth Amendment. See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 356-69 (4th ed. 1991) (describing the *Lochner* era).

<sup>39</sup> David S. Coale, *Norplant Bonuses and the Unconstitutional Conditions Doctrine*, 71 TEX. L. REV. 189, 198 (1992); see also Sunstein, *supra* note 36, at 596-97.

<sup>40</sup> 271 U.S. 583 (1926). In *Frost*, the Court invalidated California's attempt to condition the right of a trucking company to use the public roads on its agreement to follow certain limitations on charges to its customers.

<sup>41</sup> *Id.* at 593-94.



Despite the Court's abandonment of the protection of substantive economic rights in the late 1930s,<sup>42</sup> its distrust of coercive government intrusion into private rights remained. The new focus became personal liberties.<sup>43</sup> With the rise of the regulatory state following the demise of economic due process, government intervention in both economic and personal areas has become the norm rather than the exception. It has been argued that the doctrine, created from the belief that government regulation is an artificial supplement to a system governed by common law, cannot survive in a system where the opposite is true.<sup>44</sup> Thus, the doctrine's shift in focus has not been entirely smooth; it lacks a clear test or method by which conditions can be evaluated. However, the central concern about government intrusion which gave rise to the doctrine persists, perhaps on a greater scale due to the unprecedented regulatory powers of the government. Indeed, the Court continues to apply the doctrine albeit inconsistently.<sup>45</sup>

### B. Doctrinal Reasoning

The doctrine serves as a response to two arguments which support government conditions: (1) that the government's greater power to refuse to provide a benefit includes the lesser power to provide it conditionally,<sup>46</sup> and (2) that those who voluntarily participate in government programs have "waived" their constitutional protections.<sup>47</sup> The first argument has been widely criticized and, in fact, was dismissed completely in *Frost*:

It is not necessary to challenge the proposition that, as a general rule, the state, having the power to deny a privilege altogether, may grant it upon such

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<sup>42</sup> In 1937, contrary to its firmly antiregulation stance of the *Lochner* era, the Court decided a variety of cases which upheld state and congressional commerce and spending powers. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding state regulation setting a minimum wage for women workers); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding NLRB regulations on employee bargaining rights against private employer). See generally PAUL BREST & SANFORD LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 341-89 (1992) (describing the decline of judicial intervention in economic regulation).

<sup>43</sup> See Sullivan, *supra* note 36, at 1505.

<sup>44</sup> See generally Sunstein, *supra* note 36.

<sup>45</sup> The Supreme Court's application of the doctrine has lead to highly inconsistent results upholding some conditions while overturning others without a clear line of reasoning distinguishing the cases. For further discussion of the various theories analyzing the Court's treatment of these cases, see *infra* notes 85-88 and accompanying text.

<sup>46</sup> See Baker, *supra* note 36, at 1190.

<sup>47</sup> See Sunstein, *supra* note 36, at 593-94.

conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishments of constitutional rights.<sup>48</sup>

Furthermore, critics have argued that the theory is logically flawed because it assumes "that the conditional denial of a benefit is qualitatively identical to an absolute denial."<sup>49</sup>

The second argument, that those who voluntarily participate in government programs waive their constitutional rights, warrants close examination. It breaks down into two parts which the Court has frequently used as tests in its analysis:<sup>50</sup> (1) whether certain rights are inalienable and therefore cannot be waived,<sup>51</sup> and (2) whether the government's power to condition benefits coerces people into waiving their rights.<sup>52</sup>

### 1. *Unwaivable Rights: The Right to Bear a Child*

The first question goes to the heart of the Family Cap debate: are there certain rights which cannot be waived? The Court has identified particular rights which fall into this protected category—fundamental rights.<sup>53</sup> Thus, in order to evaluate Family Cap under the unconstitutional conditions doctrine, an inquiry into the rights at stake is necessary. As mentioned earlier, Family Cap infringes upon the right to bear a child as established by the rights to

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<sup>48</sup> *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926).

<sup>49</sup> *Baker*, *supra* note 36, at 1191. Although it is still occasionally implemented, *see* *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 368 (1981) (Rehnquist, J., dissenting), the "greater/lesser power" argument has also become somewhat outdated as the importance of government entitlements has grown. The value of government benefits, whether in the form of jobs or financial assistance, is now viewed as a right rather than merely a privilege. *See generally* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964). The recipient therefore deserves certain procedural safeguards before the entitlement is denied or withdrawn. *See* *Perry v. Sindermann*, 408 U.S. 593 (1972). The Family Cap program raises some questions of procedural due process as well because the women who get pregnant have no opportunity to explain the reason why the pregnancy came about or to describe their financial needs.

<sup>50</sup> *See infra* notes 74 and 79.

<sup>51</sup> *Sullivan*, *supra* note 36, at 1476-89; *see Baker*, *supra* note 36, at 1215.

<sup>52</sup> *See Sullivan*, *supra* note 36, at 1428-56.

<sup>53</sup> Fundamental rights are those which are "explicitly or implicitly guaranteed by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973) (holding that education is not a fundamental right under the Constitution). For further explanation, *see infra* note 103.

procreation, privacy, and reproductive choice. Each of these rights is well-established in the law.

The right to procreate was first recognized as a fundamental right in *Skinner v. Oklahoma*<sup>54</sup> where the Court declared it "a sensitive and important area of human rights."<sup>55</sup> In *Skinner*, the Court upheld the right of a person who was convicted two or more times for crimes "'amounting to felonies involving moral turpitude'"<sup>56</sup> to have children. If convicted felons cannot be stripped of this right, it is difficult to condone taking it away from law-abiding citizens simply because they are poor.<sup>57</sup>

In 1965, the landmark case of *Griswold v. Connecticut*<sup>58</sup> held that the fundamental right to privacy is embedded in the penumbras of the Bill of Rights.<sup>59</sup> The case involved married couples' right to use contraceptive devices.<sup>60</sup> Thus, the right to privacy was linked to the concept of reproductive choice at its inception. In an equal protection claim relying on the *Griswold* decision, unmarried persons were also guaranteed this right to choose whether or not to have children in *Eisenstadt v. Baird*.<sup>61</sup> Justice Brennan wrote, "If the right of privacy means anything, it is the right of the *individual*, married or single, *to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child*."<sup>62</sup> The establishment of this right for unmarried women is highly significant for many of the AFDC mothers. Although society still condemns

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<sup>54</sup> 316 U.S. 535 (1942).

<sup>55</sup> *Id.* at 536.

<sup>56</sup> *Id.*

<sup>57</sup> Although the case may be distinguishable from the infringement of the right to procreate involved in Family Cap because *Skinner* would have been sterilized and therefore permanently incapable of pursuing his right, the establishment of this fundamental right is merely one brick in the wall of defenses protecting a woman's right to bear children.

<sup>58</sup> 381 U.S. 479 (1965).

<sup>59</sup> *Id.* at 484. Justice Douglas's opinion in *Griswold* extracts the right to privacy from the implied rights suggested in the Bill of Rights' individual amendments. "The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of parents' choice . . . is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights." *Id.* at 482. Douglas concludes that "zones of privacy" are created by the implicit guarantees of the First, Third, Fourth, Fifth, and Ninth Amendments. "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . [T]he right of privacy which presses for recognition here is a legitimate one." *Id.* at 484-85.

<sup>60</sup> *Id.* at 479.

<sup>61</sup> 405 U.S. 438 (1972).

<sup>62</sup> *Id.* at 453 (second emphasis added).

out-of-wedlock births, the law recognizes them as the exercise of a fundamental right.

Finally, *Roe v. Wade*<sup>63</sup> and its progeny have further secured a woman's right to reproductive freedom. Although these cases are commonly known as the Abortion Cases, it has been established and affirmed that the fundamental right recognized in *Roe* includes the right to bear a child.<sup>64</sup> In upholding *Roe*, the Court in *Planned Parenthood v. Casey*<sup>65</sup> elaborated on the rights that case recognized:

If indeed the woman's interest in deciding whether to bear or beget a child had not been recognized as in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example. Yet, *Roe* has been sensibly relied upon to counter any such suggestions.<sup>66</sup>

Indeed, the Family Cap program appears to do just what the *Casey* Court predicted may occur if the right to bear a child was not constitutionally protected. The program can reasonably be viewed as an attempt to control the population growth of a certain disfavored segment of society.<sup>67</sup> *Casey* confirms that this action is impermissible.<sup>68</sup>

An analogous area of law which relies upon a woman's unconditional right to bear a child involves probation conditions placed on convicted women. In *People v. Pointer*,<sup>69</sup> a woman convicted of child abuse was put on probation for five years with the condition that if she conceived a child during that time she would be put in prison. The state court, citing both *Roe* and *Griswold*, struck down the condition saying, "There is, of course, no question that the condition imposed in this case infringes the exercise of a fundamental right to

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<sup>63</sup> 410 U.S. 113 (1973).

<sup>64</sup> See *infra* note 68.

<sup>65</sup> 112 S. Ct. 2791 (1992).

<sup>66</sup> *Id.* at 2811 (citations omitted).

<sup>67</sup> See Alexander Cockburn, *Welfare, Norplant and the Nazis: Sterilization Programs; Beat the Devil*, NATION, July 18, 1994, at 79.

<sup>68</sup> Cases affirming *Roe* and the rights it established are *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992) (upholding the essential holding of *Roe* while abandoning the trimester framework it provided); *Webster v. Reproductive Health Serv.*, 492 U.S. 490 (1989); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976).

<sup>69</sup> 151 Cal. App. 3d 1128 (1984); see also *People v. Zaring*, 8 Cal. App. 4th 362 (1992); *Rodriguez v. State*, 378 So. 2d 7 (Fla. Dist. Ct. App. 1979).

privacy protected by both the federal and state constitutions.”<sup>70</sup> The court also asserts that such a condition may “be coercive of abortion” which “is in our view improper.”<sup>71</sup>

A similar choice is faced by women who become pregnant under Family Cap: either abort or face destitution.<sup>72</sup> Indeed, women probationers and AFDC mothers bear similar relationships to the State; they are bound to it. In many ways the State controls their access to their rights. It is inexplicable why, as in *Skinner*,<sup>73</sup> the criminals’ right to bear children has been declared fundamental and inalienable, yet this same right is suddenly waivable for the AFDC mothers whose only crime is poverty.

Thus, the firmly established rights to procreation, privacy, and reproductive choice demonstrate that the right to bear children is constitutionally protected. The right is inalienable and cannot be waived. This conclusion answers only one half of the inquiry, however. In order to violate the unconstitutional conditions doctrine, the condition in question must infringe upon the protected right.

## 2. Waiving Constitutional Rights: The Coercion Element

The Court has examined this question of infringement of rights by considering whether the government’s imposition of a condition coerces people into waiving their protected rights. This analysis has been implemented in a number of cases. When a condition forces a person to choose between a fundamental right and a government benefit, the Court has often characterized the condition as coercive and referred to it as a penalty.<sup>74</sup> In *Sherbert v.*

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<sup>70</sup> *Pointer*, 151 Cal. App. 3d at 1139. It should be noted that New Jersey’s state constitution also has a privacy provision which is invoked by the plaintiffs in *C.K. v. Shalala*, No. 93-5354 (D.N.J. filed Dec. 1, 1993).

<sup>71</sup> *Pointer*, 151 Cal. App. 3d at 1141. Some conservative opponents of Family Cap also argue that it will encourage abortion.

<sup>72</sup> Following decisions like *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher v. Roe*, 432 U.S. 464 (1977), however, abortions are not easily available to poor women. Lack of Medicaid funds for abortions makes the Family Cap condition even more burdensome. For a discussion of the state laws regarding abortion funding in the states where Family Cap has been enacted, see *infra* part IV.B.

<sup>73</sup> The probation condition cases differ from *Skinner* in the same way that the Family Cap condition does; the ability to bear children is not permanently infringed for women convicts like the men being sterilized in *Skinner*. Yet, the probation condition cases show that even this temporary violation of a fundamental right is invalid.

<sup>74</sup> See generally *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (invalidating a durational residency requirement for medical care as violating right to travel); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating denial of welfare benefits

*Verner*,<sup>75</sup> one of the most notable of these cases, the Court struck down a denial of state unemployment benefits to a woman who could not work on Saturdays for religious purposes as a violation of the Free Exercise Clause of the First Amendment. Using the unconstitutional conditions doctrine, Justice Brennan described the condition as coercive:

The [denial] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.<sup>76</sup>

If the Court recognizes the burden imposed by the condition as coercive or deterrent of the ability to pursue a constitutional right, it will invalidate the condition. Opponents of Family Cap characterize it as a penalty.<sup>77</sup> The denial of benefits forces a welfare mother to choose between having a child and forfeiting the benefits, and not having a child (or being forced to terminate the pregnancy) in order for her family to maintain a livable per capita income.<sup>78</sup> As in *Sherbert*, the choice imposes the same kind of burden as if the mother were fined for having a child.

However, the Court has often found the coercive element lacking and upheld conditions which it refers to as nonsubsidies rather than penalties.<sup>79</sup>

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to residents who had lived in state for less than a year as violating the right to travel); *Sherbert v. Verner*, 374 U.S. 398 (1963) (invalidating a denial of unemployment benefits to a woman who could not work on Saturday for religious reasons as violating the Free Exercise Clause of the First Amendment); *Speiser v. Randall*, 357 U.S. 513 (1958) (invalidating a state requirement that World War II veterans take a loyalty oath as condition of receiving a veterans' property tax exemption).

<sup>75</sup> 374 U.S. 398 (1963).

<sup>76</sup> *Id.* at 404.

<sup>77</sup> See generally Williams, *supra* note 3; Press Release, *supra* note 30.

<sup>78</sup> To call the income "livable" is a generous description; often the benefits a welfare family receives are below the calculated standard of need. However, it is still better to receive some assistance than none at all. In other words, although the AFDC benefits are barely enough to live on, the needy families are better off receiving a little rather than nothing. Press Release, *supra* note 30, at 1-2.

<sup>79</sup> *Lyng v. United Auto.*, 485 U.S. 360 (1988) (upholding a denial of food stamps to families which become needy because the breadwinner is on strike); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding denial of funding for abortions); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding denial of funding for abortions); *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding cap on total amount of benefits an AFDC family can receive despite its size).

Under this characterization, the government is not interfering with the pursuit of a right, it is merely refusing to subsidize the right.<sup>80</sup> The abortion funding cases, *Maier v. Roe*<sup>81</sup> and *Harris v. McRae*,<sup>82</sup> incorporate this reasoning. In *Harris*, the appellees argued that the denial of funding for abortions under the Hyde Amendment<sup>83</sup> penalized a woman's right to choose an abortion rather than childbirth, which is funded. The Court, however, asserts that "the Hyde Amendment . . . represents simply a refusal to subsidize certain protected conduct. A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."<sup>84</sup>

Unfortunately, the Court's determinations of what is a penalty and what is a nonsubsidy are discouragingly inconsistent. The viable distinction between them is the amount of coercion the Court perceives in the government's action. Yet, how the government's refusal to subsidize Mrs. Sherbert's exercise of her religion by withholding unemployment benefits is more coercive than its refusal to subsidize low-income women's reproductive choice is difficult to explain.<sup>85</sup> Due to this ambiguity, proponents of Family Cap can characterize it as a nonsubsidy as easily as its opponents characterize it as a penalty. According to their reasoning, the government is not actively preventing women from having children, it is merely refusing to subsidize their choice to do so. In other words, a woman may have a child while on welfare, but the government is not required to help her. Yet, the same question remains: at what point does withholding help become an affirmative action penalizing the woman? Thus, relying on the penalty/nonsubsidy distinction to understand the doctrine does little to clarify its application and effect.

Other theories, such as evaluating the directness of the relation between the condition and the benefit, have been offered but are also unable to fully explain the Court's methodology.<sup>86</sup> Under this theory, the less direct or "germane"<sup>87</sup>

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<sup>80</sup> See Sullivan, *supra* note 36, at 1439.

<sup>81</sup> 432 U.S. 464 (1977).

<sup>82</sup> 448 U.S. 297 (1980).

<sup>83</sup> Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979). The Hyde Amendment was passed by Congress as a federal restriction on the use of Medicaid funds for abortion.

<sup>84</sup> *Harris*, 448 U.S. at 317 n.19.

<sup>85</sup> The particular right being violated is not dispositive of the Court's decisions either. The Court has often upheld and invalidated conditions burdening the same right in different cases. Compare *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding condition which burdens right to procreate) with *Turner v. Department of Employment Sec.*, 423 U.S. 44 (1975) (invalidating condition burdening the right to procreate). Thus, in the example in the text, the distinction between the two cases is not that the pursuit of religious beliefs is regarded more favorably by the Court than the pursuit of an abortion.

<sup>86</sup> See Baker, *supra* note 36, at 1205; Sullivan, *supra* note 36, at 1452.

the condition is to the benefit, the more willing the Court will be to invalidate it.<sup>88</sup> Neither the coercion nor the germaneness theory provides adequate guidance for future practical applications of the doctrine. Another theory, which specifically evaluates the Court's approach to public assistance cases which invoke the doctrine, provides valuable insight into the Family Cap scenario. It is known as the "price theory."<sup>89</sup>

### C. *An Application of the Doctrine*

#### 1. *The "Price Theory"*

Developed by Professor Lynn Baker, the "price theory" involves a two-prong test which, in Professor Baker's analysis, consistently predicted the Court's decisions in twenty-three public assistance cases.<sup>90</sup> The first prong asks

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<sup>87</sup> See Sullivan, *supra* note 36, at 1457.

<sup>88</sup> See *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that a condition requiring states to raise their minimum drinking age sufficiently related to the federal interest in highway safety to justify its attachment to highway funding); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (invalidating a condition which denied federal public broadcasting funds to stations that engage in editorializing); see also Sullivan, *supra* note 36, at 1464 ("Unrelatedness of condition to benefit thus characterizes a 'penalty.'").

<sup>89</sup> See generally Baker, *supra* note 36.

<sup>90</sup> These cases are: *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989) (invalidating restriction on free exercise of religion); *Lyng v. United Auto.*, 485 U.S. 360 (1988) (sustaining a condition which denied food stamp eligibility to households whose breadwinner was on strike); *Bowen v. Gilliard*, 483 U.S. 587 (1987); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987) (overturning restriction on free exercise of religion); *Lyng v. Castillo*, 477 U.S. 635 (1986) (upholding limitation on food stamp benefits available to each household); *Bowen v. Roy*, 476 U.S. 693 (1986); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (invalidating denial of unemployment benefits for refusing to work for religious reasons); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding denial of Medicaid funding for medically necessary abortions); *Williams v. Zbaraz*, 448 U.S. 358 (1980) (upholding denial of Medicaid funding for medically necessary abortions); *Califano v. Boles*, 443 U.S. 282 (1979) (upholding statute which denied Social Security death benefits to mother of deceased's illegitimate child if she never married the deceased); *Califano v. Aznavorian*, 439 U.S. 170 (1978) (sustaining durational residency condition on receipt of Social Security benefits); *Califano v. Torres*, 435 U.S. 1 (1978); *Califano v. Jobst*, 434 U.S. 47 (1977) (upholding statute which disqualifies disabled claimant from receiving benefits if he gets married); *Maher v. Roe*, 432 U.S. 464 (1977) (upholding denial of Medicaid funding for abortions which were not medically necessary in the first trimester); *Poelker v. Doe*, 432 U.S. 519 (1977) (upholding denial of public funding for elective abortions); *Turner v. Department of Employment Sec.*, 423 U.S. 44 (1975) (overturning regulation which declared pregnant women ineligible for unemployment



whether the challenged condition involves a constitutionally protected right.<sup>91</sup> If so, then the second prong looks specifically at the heart of public assistance issues and asks whether the effect of the condition is to require persons unable to earn a subsistence income, and otherwise eligible for the benefit (welfare recipients), "to pay a higher price" to engage in that constitutionally protected activity than similarly situated persons who earn a subsistence income.<sup>92</sup>

In the case of Family Cap, the first prong of the "price theory" is satisfied by the constitutionally protected right to bear a child. Before applying the second prong of Professor Baker's theory to this novel, undecided case, it would be helpful to demonstrate its use with one of her own examples.<sup>93</sup> In the abortion funding cases, *Harris* and *Maher*, the constitutional right at issue is the right to terminate one's pregnancy. Poor women claimed that the denial of Medicaid funding effectively kept them from exercising their rights. According to Professor Baker's analysis, the denial of public funding forces poor women to pay the market price for an abortion, the same price a subsistence income earning family would pay.<sup>94</sup> There is no loss of statutory entitlement and no extra cost is charged to poor women.<sup>95</sup> Poor women do not pay a higher price to engage in the protected conduct. Therefore, the condition does not infringe upon any constitutional right. This conclusion is consistent with the Court's holdings in those cases.<sup>96</sup>

Regarding Family Cap, Professor Baker's second prong raises a popular argument frequently used by proponents of the program: working class families do not get raises from their employers when they have additional children,

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benefits for certain time surrounding birth); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (invalidating durational residency requirement for nonemergency medical care as a restriction on interstate travel); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (invalidating restriction on freedom of association); *Graham v. Richardson*, 403 U.S. 365 (1971) (overturning restriction on alien's interstate travel as violation of equal protection); *Wyman v. James*, 400 U.S. 309 (1971) (upholding regulation which conditioned AFDC benefits on recipient's permitting a search of its home); *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding maximum amount of AFDC benefits available to families of certain size); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating restriction on right to interstate travel); *Sherbert v. Verner*, 374 U.S. 398 (1963) (invalidating restriction on right to practice religion).

<sup>91</sup> Baker, *supra* note 36, at 1217.

<sup>92</sup> *Id.*

<sup>93</sup> Professor Baker illustrates her theory in all twenty-three cases. This particular example is found at Baker, *supra* note 36, at 1231.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

therefore welfare families do not deserve additional benefits.<sup>97</sup> This argument is flawed, however, and the price theory illustrates its shortcomings.

## 2. Application and Analysis

In this case, does the government's denial of additional benefits require AFDC families to pay a higher price to engage in the constitutionally protected right to bear children than it requires of families who earn a subsistence income? The answer is yes. The government does provide a benefit to subsistence-income-earning families in the form of tax deductions for dependent children and tax credits for childcare costs.<sup>98</sup> The money these families save per child is far more than the additional benefits a welfare mother receives.<sup>99</sup> This analysis looks to *the government's* treatment of the families earning a subsistence income, not the employer's, because it is the government's action which is in question. Family Cap's proponents' argument about getting a raise is comparing apples and oranges. Thus, according to one interpretation of Professor Baker's theory of the unconstitutional conditions doctrine, the Family Cap program forces welfare mothers to pay a much higher price to pursue their constitutional right to have a child.

The second prong of Professor Baker's theory indirectly incorporates a form of equal protection analysis: wealth-based discrimination. In comparing the effect of the condition on the rights of welfare families to the rights of nonwelfare families, the theory seeks to ensure an equality of access to rights between economic classes.<sup>100</sup> "[E]ach such condition separates those earning a subsistence income but otherwise eligible for the benefit from otherwise eligible persons unable to earn a subsistence income by providing only the latter an incentive not to engage in a particular behavior."<sup>101</sup> However, the Court has

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<sup>97</sup> King, *supra* note 31.

<sup>98</sup> Anna Quindlen, *The \$64 Question*, N.Y. TIMES, Jan. 22, 1992, at A21.

<sup>99</sup> For example, a single mother with two children in New Jersey receives tax deductions and childcare credits from both the federal and state governments. If her yearly income is \$20,000, she will save \$600 in federal deductions and \$30 in state deductions. *See* 26 U.S.C.A. § 151(c) (West. Supp. 1995) (federal deductions); N.J. STAT. ANN. § 54A:3-1(b)(2) (West Supp. 1994) (state deductions). She also will receive \$1200 of federal credit and \$40 of state credit to offset her childcare costs for two dependents. *See* 26 U.S.C.A. § 21(a), (c) (West. Supp. 1995) (federal childcare credit); N.J. STAT. ANN. § 54:8A-15.1 (West 1986). The total amount she saves is \$1870. By comparison, the average amount a New Jersey welfare mother receives each month for an additional child is \$64, or \$778 a year. *See also* Williams, *supra* note 3, at 736 n.107; Quindlen, *supra* note 98.

<sup>100</sup> *See* Baker, *supra* note 36, at 1220.

<sup>101</sup> *Id.* at 1208 n.79.

repeatedly refused to make wealth-based classifications suspect.<sup>102</sup> Professor Baker's method, therefore, allows for a rational basis level of review to cases involving fundamental rights which normally demand a strict scrutiny review.<sup>103</sup> In this way, her theory accounts for the seemingly haphazard results of the unconstitutional conditions doctrine in public assistance cases. Yet, lowering the level of review circumvents the issue. These cases involve more than a mere question of the allocation of government resources; the rational basis review, generally applied when evaluating typical state administrative and regulatory actions, is inadequate when a constitutional right is targeted. If a fundamental right is at stake, the Court should expect no less than a compelling state interest and that the condition imposed be narrowly tailored to serve that interest.<sup>104</sup>

#### IV. CAN FAMILY CAP SURVIVE A STRICT STANDARD OF REVIEW?

It has been suggested that determining the appropriate level of judicial review is the central purpose of the unconstitutional conditions doctrine.<sup>105</sup> Regardless of the analysis of penalties and nonsubsidies, the essential value of the doctrine is that it serves to undercut a government attempt to infringe upon

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<sup>102</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-28 (1973); *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970). In other words, the Court does not use strict scrutiny when reviewing wealth-based discrimination.

<sup>103</sup> The Supreme Court has declared certain rights "fundamental." These rights demand the strictest level of judicial review. The Court decides whether the state legislation in question "impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *Rodriguez*, 411 U.S. at 17. In describing its application of this doctrine in *Shapiro v. Thompson*, 394 U.S. 618 (1971), the Court states, "It is enough to say that the classification in *Shapiro* was subjected to strict scrutiny under the compelling state interest test . . . because it impinged upon the fundamental right of interstate movement." *Graham v. Richardson*, 403 U.S. 365, 375 (1971) (applying strict scrutiny based on an equal protection claim involving a suspect classification, national origin).

<sup>104</sup> The Supreme Court has stated: "[T]he Fifth and Fourteenth Amendments' guarantee of 'due process of law' . . . include[s] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993) (citations omitted). Also, "[S]trict scrutiny . . . require[s] that the regulation be narrowly tailored to advance a compelling state interest . . . ." *Burdick v. Takushi*, 112 S. Ct. 2059, 2063 (1992).

<sup>105</sup> "Unconstitutional conditions doctrine determines how much government justification is to be demanded, *not* whether the demand has been met." Sullivan, *supra* note 36, at 1422 n.22.

a fundamental right with minimal justification for doing so.<sup>106</sup> The doctrine provides a rationale for using strict scrutiny in cases which do not directly call for it because they do not directly violate a constitutional right. Public assistance cases, for example, generally require only a rational relation between the condition and the legitimate state interest. The doctrine allows the Court to look beyond the smaller statutory right to public assistance and to address the greater constitutional right being threatened. The inquiry is two-fold: does the condition actually infringe upon the protected right and, if so, can the government justify the infringement?

One purpose of the Family Cap program is to discourage AFDC recipients from having additional children while enrolled on public assistance.<sup>107</sup> Thus, the condition it imposes upon women acts as an obstacle to their right to have children; it is intended to burden that right. Preliminary statistics show that, in New Jersey, from August to October 1993, there were 452 fewer babies born to mothers on welfare than in those months the previous year.<sup>108</sup> Although it is unclear whether these figures indicate the effectiveness of Family Cap or simply a drop in the birthrate attributable to other factors, the proponents of the program claim credit for the change.<sup>109</sup> Therefore, the only issue remaining is

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<sup>106</sup> See Sunstein, *supra* note 36, at 603.

<sup>107</sup> Proponents of the program refer to this purpose as encouraging recipients to make responsible choices: "What this does is give welfare recipients a choice. They either can have additional children and work to pay the added costs, or they can decide not to have any more children. It's their call and a decision that puts them in the same position as anyone else in mainstream America who must choose among options." King, *supra* note 31 (quoting New Jersey Assemblyman Wayne Bryant). Opponents of the program challenge the idea that welfare recipients have the same options and choices that anyone else in mainstream America has. They interpret the purpose of Family Cap as an "attempt to deter and penalize women on AFDC from conceiving and having children" in order to "reduce rates of fertility and childbirth among AFDC families." Press Release, *supra* note 30, at 2, 1 respectively.

<sup>108</sup> Richard Lacayo, *Unraveling the Safety Net*, TIME, Jan. 10, 1994, at 25, 27.

<sup>109</sup> The correlation between economic incentives (or disincentives) and behavior modification is highly contested.

The reason for the lack of correlation seems apparent. Decisions about childbearing, marriage, and living arrangements are very complex. They surely are not unaffected by economic incentives, but they are affected by a host of other factors as well. If those other factors—for example, the general societal perception of out-of-wedlock births or of single parenting—are also shifting, they may dwarf the effects of the economic incentives. And, even if they are not, there may be very few people for whom small changes in economic well-being would make a difference sufficient for them to change their sexual behavior or basic living arrangements.

whether the government can justify its action. There are a variety of state interests which may be served by the Family Cap program: welfare reform, economic concerns, encouraging welfare recipients to be responsible family planners. Whether any of these interests qualifies as compelling is arguable. The real shortcoming of the program, however, lies in the substance of the program itself. It is far from "narrowly tailored" to meet any compelling state interest.

### A. Family Cap's Flawed Premise

Designed to promote behavioral modification by removing any financial incentive to bear children, Family Cap feeds off of the perception that welfare recipients are dysfunctional and deviant members of society because they cannot support themselves.<sup>110</sup> The program purports to encourage "mutual responsibility" between the recipients and the state by forcing welfare mothers to make the same difficult decisions about having children which nonwelfare families must make.<sup>111</sup> It perpetuates the idea that welfare mothers are "thoughtless childmaking people" who constantly get pregnant in order to collect more money from the government rather than work. By reducing the rate of childbirth, proponents of the program claim that it will begin to solve the problem of generational welfare dependency.<sup>112</sup>

The facts, however, defy the stereotypes.<sup>113</sup> Contrary to public perception, AFDC families are typically the same size or smaller than nonwelfare two-

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THEODORE R. MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES 220 (1990). If the program's use as an incentive is not effective, it cannot justify the constitutional infringements it causes. Thus, if the 452 fewer births are not attributable to the Family Cap disincentive, the welfare mothers and their 2398 children who were born during those months are being burdened by the program for no reason. See generally Lacayo, *supra* note 108, at 27.

Furthermore, "even if the decline turns out to be a result of the cap, it will represent a reduction of just one-fourth of 1 percent of the state's caseload." Richmond, *supra* note 11 (paraphrasing the comments of Michael Laracy, Director of Policy and Planning at New Jersey's Human Services Department, who studied the Family Cap for the Center on Law and Social Policy while on a leave of absence).

<sup>110</sup> See Williams, *supra* note 3 *passim*.

<sup>111</sup> King, *supra* note 31.

<sup>112</sup> *Id.*

<sup>113</sup> For a thorough and illuminating discussion of the obstacles facing welfare mothers, see Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817 (1994); Lucie E. White, *On the "Consensus" to End Welfare: Where Are the Women's Voices?*, 26 CONN. L. REV. 843 (1994).

parent families in the general population.<sup>114</sup> In New Jersey, for example, the average number of children in a welfare family is 1.9 while the average for nonwelfare families is 2.0.<sup>115</sup> Nationally, the average number of children in a welfare family has decreased over the last two decades from 3.0 to 1.9 presently.<sup>116</sup> Less than ten percent of all welfare families have more than three children.<sup>117</sup> Furthermore, a welfare mother's likelihood of giving birth decreases the longer she remains on welfare.<sup>118</sup> Most welfare mothers, however, do not participate in the system for more than two years; most people's reliance on the system is transitional.<sup>119</sup> Often women who become single mothers by divorce need welfare support as they adjust to the burdens of playing a dual parental role and of finding work and sufficient child care.<sup>120</sup> These facts do not deny that twenty-five percent of the welfare mothers are long-term recipients,<sup>121</sup> they merely put the overblown stereotype into a realistic perspective.

Thus, the very premise upon which Family Cap is based is flawed. The primary problems it seeks to remedy have been distorted. Moreover, the program contradicts the stated purposes of AFDC: to assure the care and protection of needy dependent children and to assist parents in becoming self-supporting consistent with maintaining family life.<sup>122</sup> The denial of benefits penalizes the needy children. The newborn children who are ineligible for aid are not the only ones affected; all of the children in the family suffer from the reduction in the family's per capita income. In New Jersey, recent figures show that over 240,000 children receive AFDC benefits.<sup>123</sup> Furthermore, Family

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<sup>114</sup> See Williams, *supra* note 3, at 737-38.

<sup>115</sup> Richmond, *supra* note 11 (citing the New Jersey Department of Human Services as its source).

<sup>116</sup> See Press Release, *supra* note 30, at 4; Jason DeParle, *Why Marginal Changes Don't Rescue the Welfare System*, N.Y. TIMES, Mar. 1, 1992, § 4, at 3; see also Williams, *supra* note 3, at 738.

<sup>117</sup> See DeParle, *supra* note 116; Williams, *supra* note 3, at 738.

<sup>118</sup> See Williams, *supra* note 3, at 738 n.116.

<sup>119</sup> Lacayo, *supra* note 108, at 25; see also DeParle, *supra* note 116.

<sup>120</sup> ELLWOOD, *supra* note 29, at 148.

<sup>121</sup> *Id.* Ellwood does note that this significant minority of welfare mothers uses almost two-thirds of the AFDC funds distributed each year. See also DeParle, *supra* note 116.

<sup>122</sup> See 42 U.S.C. § 601 (1988). It has been established through case law that the "paramount goal" of the AFDC program is to protect dependent children. See *Gardenia v. Norton*, 425 F. Supp. 922 (D. Conn. 1976); *Doe v. Hursh*, 337 F. Supp. 614 (D. Minn. 1970); *Doe v. Shapiro*, 302 F. Supp. 761 (D. Conn. 1969); *Woods v. Woods*, 133 Cal. App. 3d 954 (1982); *Evans v. Department of Social Servs.*, 178 N.W.2d 173 (Mich. 1970).

<sup>123</sup> Richmond, *supra* note 11 (citing the New Jersey Department of Human Services as its source).

Cap does nothing to help welfare mothers become self-supporting. Pregnant women and women with newborn infants are often unable to work outside the home due to obvious health and childcare constraints. Withholding necessary funds simply plunges the entire family further into poverty and dependency.

The symbolic effect of the Family Cap program cannot be ignored. The program effectively tells women that they do not deserve to have a family because they are poor. Encouraging recipients to become self-supporting and independent involves not only the "mutual responsibility" touted by Family Cap's proponents, but mutual respect. This program shows little respect for the welfare mothers' ability to make choices and to care for their families. The welfare system as a whole has been criticized for its demeaning stigma; the bureaucratic difficulties of being a recipient are often enough to undermine one's self esteem.<sup>124</sup> Family Cap imposes the previously described inaccurate and negative stereotypes of welfare mothers on the seventy-five percent of the recipients<sup>125</sup> who do not deserve it.

### *B. Between a Rock and a Hard Place: Inaccessibility of Abortion for Poor Women*

In the unfortunate event that a welfare mother has an unplanned pregnancy,<sup>126</sup> her options are exceedingly limited. As a result of the Hyde Amendment<sup>127</sup> and the subsequent case declaring it constitutional,<sup>128</sup> states may put restrictions on Medicaid funding available for abortions. Thus, many poor women cannot afford to terminate their pregnancies. This mixed set of societal messages further stigmatizes welfare mothers. First, they are disdained for their poverty. Next, they are effectively told they are not worthy of having children. Finally, they face society's moral judgments about abortion in the form of its limited availability.

Each of the states which has enacted Family Cap has an anti-abortion-funding statute or regulation. New Jersey will not fund an abortion unless it is

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<sup>124</sup> See ELLWOOD, *supra* note 29, at 141 (describing the bureaucratic nightmare involved in receiving welfare benefits).

<sup>125</sup> *Id.* at 148.

<sup>126</sup> Over half of all pregnancies in the United States each year, 3.4 million, are unintended. Forty-three percent of these unintended pregnancies, 1.4 million, result from the failure of contraceptives. RACHEL B. GOLD, ABORTIONS AND WOMEN'S HEALTH: A TURNING POINT FOR AMERICA? 11 (1990).

<sup>127</sup> Act of Nov. 20, 1979, Pub. L. No. 96-123, § 109, 93 Stat. 923, 926 (1979). See *supra* note 83 for an explanation of the Hyde Amendment.

<sup>128</sup> *Harris v. McRae*, 448 U.S. 297 (1980).

medically necessary to save the life of the mother.<sup>129</sup> Wisconsin's statute restricts funding to medically necessary cases and those which are the result of a rape or incest as verified by a doctor.<sup>130</sup> Ironically, in light of the Wisconsin Family Cap's focus on teen mothers, the state also prohibits the use of public funds for purchasing or dispensing contraceptives in adolescent health clinics located in schools, providing abortions to adolescents, and advertising abortion services as part of a state media effort to prevent teen pregnancy.<sup>131</sup> Arkansas has a constitutional amendment prohibiting the use of public funds to pay for any abortion "except to save the mother's life."<sup>132</sup> Georgia's rule against funding abortions was promulgated by its Department of Medical Assistance and was judicially declared to include all abortions which are medically necessary and the minimum medical services involved in those procedures.<sup>133</sup>

These restrictions on public funding for abortions have a significantly negative impact on poor women. Nearly two-thirds of the women who have abortions chose that option because they cannot afford to have a child.<sup>134</sup> Yet, due to the funding restrictions, this option is often inaccessible. As a result, twenty to twenty-five percent of Medicaid-eligible women seeking abortions carry their unwanted pregnancies to term.<sup>135</sup> Many poor women forgo basic necessities such as food and clothing in order to raise the money for an abortion.<sup>136</sup> Out of desperation, some women take serious health risks by either resorting to illegal or self-induced abortions<sup>137</sup> or delaying the abortion until after nine weeks of pregnancy.<sup>138</sup> The threat of the Family Cap denial of benefits will surely act as a factor for women who feel they cannot afford to

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<sup>129</sup> N.J. STAT. ANN. § 30:4D-6.1 (West 1981).

<sup>130</sup> WIS. STAT. ANN. § 20.927 (West 1986).

<sup>131</sup> WIS. STAT. ANN. § 46.93(4) (West 1987).

<sup>132</sup> ARK. CONST. of 1874, amend. 68, § 1 (1994). The amendment was proposed by initiative petition and adopted at the 1988 general election.

<sup>133</sup> Doe v. Busbee, 481 F. Supp. 46 (N.D. Ga. 1979).

<sup>134</sup> GOLD, *supra* note 126, at 19.

<sup>135</sup> *Id.* at 51.

<sup>136</sup> *Id.* at 52.

<sup>137</sup> Approximately five percent of Medicaid-eligible women resort to these dangerous measures. Carole A. Corns, Comment, *The Impact of Public Abortion Funding Decisions on Indigent Women: A Proposal to Reform State Statutory and Constitutional Abortion Funding Provisions*, 24 U. MICH. J.L. REF. 371, 396 (1991).

<sup>138</sup> GOLD, *supra* note 126, at 52. Due to the restrictions on funding, nearly 50% of Medicaid-eligible patients have their abortions after the ninth week of pregnancy. After the eighth week of pregnancy the risk of death or serious illness increases greatly. An abortion performed at eleven weeks is three times more dangerous than one performed at eight weeks. *Id.* at 29.



have a child. Unfortunately, these women often also cannot afford an abortion and will sadly have to resort to one of these options.

Ultimately, an unplanned pregnancy can spell disaster for a welfare mother. The laws on either end of her predicament cut her off; the state will not help her support the new child nor will it help her terminate the pregnancy and yet it expects her to become self-supporting and independent. The irony is that, in the end, the state will still pay for the child in the form of health, education, and crime problems commonly associated with poverty.<sup>139</sup>

### C. Remembering the Children

A final, but far from anecdotal, issue concerns who really pays the price for this reform effort. The children do. Regardless of the infringement of their mothers' constitutional rights, the children bear the burden of the Family Cap condition. The newborn children and the other children in AFDC recipient families are two of the parties represented in the New Jersey class action suit mentioned earlier.<sup>140</sup> These families can barely clothe and feed their children on the pre-Family Cap benefits they receive. The denial of additional funds often means the family will become homeless because there is not enough money to pay rent.<sup>141</sup> These results are exactly what AFDC is designed to prevent. In reality, Family Cap limits the effectiveness of AFDC.

Welfare reform often acts at the expense of the children it affects. As one social scientist explains:

[Children] are the silent partners whose voices are seldom heard and whose needs are seldom considered in the moral debate about welfare. . . . At best,

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<sup>139</sup> HANDLER & HASENFELD, *supra* note 28, at 201-09. Another alternative which may be suggested is adoption. However, reality steps in once again. Many welfare mothers are minorities. In 1988, 45% of welfare recipients in the United States were nonwhite. In some states, however, like New Jersey, welfare recipients are predominantly from minority backgrounds. See Letter from Alan Jenkins, NAACP Legal Defense and Educational Fund, Inc., Nina Perales, Puerto Rican Legal Defense and Education Fund, and Martha Davis, NOW Legal Defense and Educational Fund, to Louis Sullivan, Secretary of U.S. Department of Health and Human Services 10 nn.20 & 21 and accompanying text (June 26, 1992) (on file with the *Ohio State Law Journal*). Minority children are adopted less often than white children. In fact, until recently, many adoption agencies excluded people of color from the adoption process. See Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color, and Low-Income Women*, in REPRODUCTIVE LAWS FOR THE 1990s 52 (Sherrill Cohen and Nadine Taub eds., 1989). If no one adopts the children, they become costly wards of the state.

<sup>140</sup> Press Release, *supra* note 30, at 2.

<sup>141</sup> *Id.* at 1.

they are viewed as an impediment to setting the poor to work. . . . At worst they are viewed as the result of the moral depravity of the poor. The impact of welfare . . . on the well-being of children is generally ignored.<sup>142</sup>

Family Cap is a perfect example of how a cost-benefit analysis tends to ignore the needs of children. Any government program which so directly affects children's needs must be narrowly tailored to meet a compelling state interest. For this reason alone, Family Cap fails the test.

## V. CONCLUSION

The Family Cap program compromises the integrity of our legal system and the constitutional rights it is designed to protect. This Comment has attempted to show how welfare mothers' fundamental rights are being sacrificed in the name of reform. According to the doctrine of unconstitutional conditions, the government is barred from indirectly violating any right which it cannot violate directly. The right to bear a child is such a right. As discussed in this Comment, a strict application of the doctrine is not dispositive due to its inconsistent precedents. Yet, the doctrine is helpful in determining the appropriate level of judicial review, strict scrutiny.

Applying the strictest standard of review reveals the inconsistencies and poorly conceived nature of the Family Cap program. It is based on inaccurate stereotypes of welfare mothers, runs contrary to state abortion policies, and hurts needy children who should be benefited, not burdened, by AFDC. The denial of benefits deprives the families of basic necessities like food, clothing, and housing. The choice between having a child and being able to provide these necessities is no choice at all for a single welfare mother who becomes pregnant. In the end, Family Cap is no more than a punitive measure imposed by society on its least favored citizens.

Ultimately, whether or not a court finds that Family Cap violates the fundamental right to bear a child, the program fails as an unsound public policy. For this reason, not only should states reconsider its use, but the federal government should abandon any plans to enact it on a national level. The Republican's "Contract with America" supports Family Cap programs<sup>143</sup> and President Clinton, who previously said he would not sign a Family Cap bill,<sup>144</sup> now openly endorses these reforms.

The American welfare system is in need of drastic reform; this fact is undeniable. As the bureaucracy grows and the number of available jobs

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<sup>142</sup> HANDLER & HASENFELD, *supra* note 28, at 199.

<sup>143</sup> Eliza N. Carney, *Test Drive*, 26 NAT'L J. 2893 (1994).

<sup>144</sup> King, *supra* note 32.

shrinks, the system is unable to achieve its purpose, to help recipients become self-supporting. However, the failures of the present system cannot be summarily blamed on the recipients. Their rights are not the price society can afford to pay in order to fix the problem.

